

DENNIS J. HERRERA, State Bar #139669
City Attorney
KRISTEN A. JENSEN, State Bar #130196
THOMAS S. LAKRITZ, State Bar #161234
VICTORIA WONG, State Bar #214289
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-6547
Facsimile: (415) 554-4747
E-Mail: tom.lakritz@sfgov.org

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

METRO FUEL LLC, a Delaware limited liability company,

Plaintiff.

vs.

CITY OF SAN FRANCISCO, a municipal corporation, COUNTY OF SAN FRANCISCO, a subdivision of the State of California, CITY AND COUNTY OF SAN FRANCISCO, a chartered California city and county and DOE 1 through DOE 10.

Defendants.

Case No. C07-6067 JSW

**RESPONSE TO ADMINISTRATIVE
MOTION FOR LEAVE TO FILE A
MOTION FOR PRELIMINARY
INJUNCTION AND TO FILE A
MEMORANDUM OF LAW OF TWENTY-
FIVE PAGES IN SUPPORT THEREOF**

Hearing Date: July 11, 2008
Time: 1:30 p.m.
Place: Courtroom 2, 15th Floor

Trial Date: October 26, 2009

INTRODUCTION

Defendants the City and County of San Francisco, sued herein as the City of San Francisco, County of San Francisco, and City and County of San Francisco (collectively, "the City" or "San Francisco") submits this response to Metro Fuel, LLC ("Metro Fuel") administrative motion.

DISCUSSION

I. METRO FUEL FILED ITS ADMINISTRATIVE MOTION IN VIOLATION OF THE COURT'S JUNE 12, 2008 ORDER

In its June 12, 2008 Order, the Court set a status conference for July 11, 2008 at 1:30 p.m. and stated, "[t]he case shall remain stayed until the case management conference." (Docket #33.) Without seeking Court relief from the stay, Metro Fuel filed the present motion on July 3, 2008, while the Court-imposed stay was still in effect. Thus, Metro Fuel's motion was filed in violation of the Court's June 12, 2008 Order, and, therefore, should be denied without prejudice.

II. THE COURT SHOULD CONTINUE THE STAY

The City contends that the Court should continue to stay of this litigation until the Ninth Circuit resolves *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F.Supp.2d 927 (C.D. Cal. 2006), *appeal docketed*, No. 07-55179 (9th Cir. Feb. 1, 2007) and *Metro Lights, L.L.C. v. City of Los Angeles* No. 04-1037, 2006 WL 4941839 (C.D. Cal. Nov. 3, 2006), *appeal docketed*, No. 07-55207 (9th Cir. Feb. 9, 2007). Prior to filing the present motion, Metro Fuel felt the same way. As both the City and Metro Fuel informed the Court on May 8, 2008:

WHEREAS, the United States Court of Appeals for the Ninth Circuit recently scheduled oral argument for June 4, 2008, at 9:00 a.m., in Pasadena, California, in *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F.Supp.2d 927 (C.D. Cal. 2006), appeal docketed, No. 07-55179 (9th Cir. Feb. 1, 2007) and *Metro Lights, L.L.C. v. City of Los Angeles* No. 04-1037, 2006 WL 4941839 (C.D. Cal. Nov. 3, 2006), appeal docketed, No. 07-55207 (9th Cir. Feb. 9, 2007); and

WHEREAS, Plaintiff Metro Fuel LLC and Defendant City and County of San Francisco believe that the issues under consideration in the two appeals mentioned above are close to the issues involved in this litigation; and

WHEREAS, the parties mutually believe that because of the closeness of the issues involved it would be prudent and efficient for the parties and for the Court to stay the present litigation until the Ninth Circuit resolves the two appeals; [. . .]

(Docket # 25.)

1 Metro Fuel offers no explanation for its change in position. Nor is there any new
 2 development that would support a lifting of the stay. Instead, the Ninth Circuit continues to consider
 3 *Metro Lights*, and no decision has been issued in those appeals. Because the Ninth Circuit's ruling
 4 will likely give this Court guidance on the issues raised in this case, the City respectfully requests that
 5 the Court continue the stay for 90 days, until October 10, 2008.¹

6 Metro Fuel has not offered the Court any legitimate reason to not only lift the stay, but to
 7 consider its proposed motion for a preliminary injunction. Metro Fuel's claim of "imminent
 8 irreparable harm" (Administrative Motion at p. 4) as a basis for its motion is not supported by the
 9 facts. Instead, the only support offered for this claim is the unfounded allegation that the City has
 10 "engaged in an aggressive campaign of harassing Plaintiff's lessors." (Administrative Motion at p. 4.)
 11 This claim is patently false for at least three reasons. First, the City has issued several Notices of
 12 Violation ("NOV's") to property owners for signs for which there is no record of a building (or any
 13 other) permit ever being issued. These NOV's are being issued pursuant to San Francisco Planning
 14 Code section 604, which requires each sign to have a building permit. A copy of one of these NOV's
 15 is attached as Exhibit A. It is clear that Metro Fuel finds complying with local ordinances (even local
 16 ordinances it is not challenging in this litigation) to be burdensome. But it does not make the NOV's
 17 improper. Even if the Court were to grant Metro Fuel all of the relief it seeks, which the City denies
 18 Metro Fuel is entitled to, it would not affect the validity of the NOV's. Metro Fuel cannot seriously
 19 argue that the First Amendment protects them from having to seek permits issued under the City's
 20 police powers.

21 Second, the lawsuit against Metro Fuel by *one of its lessors*, offered as evidence of the *City's*
 22 alleged "harassment" of Metro Fuel, is not the result City's issuance of an NOV. Rather the lessor's

23
 24 ¹ Metro Fuel's claims that "[t]he City has conceded that *Metro Lights*, which is on
 25 appeal to and has already been argued before the Ninth Circuit, controls the outcome of this case" (Administrative Motion at p. 4.) is a misrepresentation of the City's position. The City only contends
 26 that it would be prudent and efficient for the parties and for the Court to stay the present litigation
 27 until the Ninth Circuit resolves the two appeals. The City never indicated that the Ninth Circuits'
 impact on the issues raised in this action.

1 lawsuit is premised upon Metro Fuel's promise to the lessor that it would "address all [NOV's] and
 2 seek their expeditious resolution." (*John Yuen v. Metro Fuel, LLC*, Superior Court San Francisco
 3 Superior Court, CGC-08-476137.) A copy of the complaint is attached as Exhibit B. The lawsuit
 4 alleges, among other things, Metro Fuel "did not 'address all notices and seek their expeditious
 5 resolution' and has not indemnified and held harmless the Plaintiff from all losses and penalties
 6 arising out of in connections with the signs on Plaintiff's property."

7 Finally, Metro Fuel's dilatory strategy belies its "imminent irreparable harm" argument.
 8 Metro Fuel filed this action on November 30, 2007, 477 days (over 15 months) after the trial court
 9 issued its ruling in *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F.Supp.2d 927 (C.D. Cal. 2006),
 10 *appeal docketed*, No. 07-55179 (9th Cir. Feb. 1, 2007). After waiting over a year to file the present
 11 action, Metro Fuel then waited another 46 days to serve the City with the complaint. Next, Metro
 12 Fuel requested and stipulated to an October 2009 trial date for this matter. These delays, along with
 13 Metro Fuel's earlier representation to the Court regarding the prudence of staying the matter pending
 14 the outcome of the *Metro Lights* case, demonstrates that Metro Fuel does not reasonably believe it is
 15 subject to "imminent irreparable harm." *ACLU v. City of Las Vegas*, 13 F.Supp.2d 1064, 1083 (D.
 16 Nev. 1998) [Seeking a preliminary injunction three months after filing their complaint and two years
 17 after event "implies lack of urgency and irreparable harm"]; *Oakland Tribune, Inc. v. Chronicle
 18 Publ'g Co.*, 762 F.2d 1374, 1377 ["Plaintiff's long delay before seeking a preliminary injunction
 19 implies a lack of urgency and irreparable harm"].

20 **III. IF THE COURT GRANTS METRO FUEL LEAVE TO FILE A MOTION FOR A
 21 PRELIMINARY INJUNCTION, THE CITY MUST BE GIVEN TIME TO CONDUCT
 22 DISCOVERY**

23 Although neither party has made Fed. R. Civ. P. 26 disclosures and neither party has
 24 conducted discovery nor disclosed experts, Metro Fuel seeks to deny the City an opportunity to
 25 obtain needed material to oppose Metro Fuel's motion for a preliminary injunction. In the event that
 26 the Court grants Metro Fuel leave to file its motion, the City requests that the motion be scheduled so
 as to permit the City to obtain discovery necessary to defend against that motion.

27 On June 25, 2008, the City Attorney's Office provided Metro Fuel's counsel with a list of
 28 material the City needs to oppose Metro Fuel's motion for a preliminary injunction. A copy of the list
 RESPONSE TO ADMINISTRATIVE MOTION
 USDC No. C07-6067 JSW

1 is attached as Exhibit C. Metro Fuel's counsel provided the City Attorney's Office with a draft
 2 proposed discovery protective order on July 9, 2008. Should the Court not continue the stay, the City
 3 Attorney's Office will work with Metro Fuel's counsel in an effort to reach an agreement on the terms
 4 and scope of the discovery protective order. The City, however, does not know if Metro Fuel will
 5 produce all of the documents on the City's June 25, 2008 list, even if the Court approves a discovery
 6 protective order.

7 In addition, the City does not know exactly what Metro Fuel is challenging. The City
 8 contends that Metro Fuel's first amended complaint only challenges San Francisco Planning Code
 9 section 611 (the ban on new general advertising signs). Metro Fuel's present motion suggests that it
 10 intends to challenge other not yet identified sections of Article 6. Metro Fuel now alleges that "the
 11 Sign ordinance contains a slew of highly restrictive underlying zoning regulations that, if enforced,
 12 would prohibit most, if not all, of Plaintiff's panel signs. *See generally* Sign Ordinance §§ 605-608."
 13 (Administrative Motion at pp. 1-2.) Without the benefit of Fed. R. Civ. P. 26 disclosures and a clear
 14 indication from Metro Fuel of the specific sections it seeks to challenge, the City cannot know what
 15 discovery it might need to oppose Metro Fuel's motion for a preliminary injunction.

16 Finally, the City understands that Metro Fuel intends to file a declaration from at least one
 17 expert in support of its motion. In order to rebut this expert testimony, the City will require time to
 18 conduct appropriate discovery.

19 Metro Fuel should not be permitted to have its motion for preliminary injunction heard before
 20 the City (1) knows what specific sections of Article 6 Metro Fuel is challenging and (2) has an
 21 opportunity to conduct limited discovery necessary to defend against such a motion. This is
 22 particularly true where, as here, Metro Fuel has failed to show any imminent harm that would result
 23 from the delay necessary to conduct discovery.

24 **IV. IF THE COURT GRANTS METRO FUEL LEAVE TO FILE A MOTION FOR A
 25 PRELIMINARY INJUNCTION, THE COURT SHOULD SCHEDULE THE CITY'S
 MOTION FOR JUDGMENT ON THE PLEADINGS FOR THE SAME TIME**

26 The City contends that as a matter of law, Metro Fuel's case fails. The City plans to file a
 27 motion for judgment on the pleadings to present these legal issues to the Court. Of course, the City's
 28 motion for judgment on the pleadings will be limited to legal issues and will not be based upon

1 factual allegations outside the pleadings, except those subject to judicial notice. Because the City's
 2 motion for judgment on the pleadings will likely raise similar and related issues to those raised by
 3 Metro Fuel in its motion for a preliminary injunction, the City suggests that the Court set a briefing
 4 schedule so that both motions can be heard at the same time.

5 If the Court grants Metro Fuel leave to file a motion for preliminary injunction, the City
 6 agrees that the Court should allow each side to file a 25-page brief in support of and in opposition to
 7 Metro Fuel's preliminary injunction motion. The City's motion for judgment on the pleadings should
 8 be governed by the same page limits.

9 The scheduling for both motions should take into account the City's need to conduct limited
 10 discovery. The City's lead counsel will be out of the office and unavailable the week of July 14,
 11 2008, returning to the office on July 21, 2008.

12 **CONCLUSION**

13 The Court should deny Metro Fuel's administrative motion, because it was filed in violation fo
 14 the Court-imposed stay. The City further requests that the Court stay this litigation for 90 days, until
 15 October 10, 2008. If the Court grants Metro Fuel leave to file a motion for preliminary injunction,
 16 the Court should allow the City to conduct limited discovery. The Court should also allow the City to
 17 file a motion for judgment on the pleadings and schedule both motions for the same hearing.

18
 19 Dated: July 9, 2008

20 DENNIS J. HERRERA
 21 City Attorney
 22 KRISTEN A. JENSEN
 23 THOMAS S. LAKRITZ
 24 VICTORIA WONG
 25 Deputy City Attorneys

26 By: /S/
 27 THOMAS S. LAKRITZ

28 Attorneys for Defendant CITY AND COUNTY OF
 SAN FRANCISCO